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No. 01-679

IN THE
Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

	Page
CASES:	
Arkansas Med. Soc'y, Inc. v. *Reynolds,* 6 F.3d 519 (8th Cir. 1993)	7
Blessing v. *Freestone*, 520 U.S. 329 (1997)	*passim*
Cort v. *Ash*, 422 U.S. 66 (1975)	3
Evergreen Presbyterian Ministries Inc. v. *Hood,* 235 F.3d 908 (5th Cir. 2000)	7
Falvo v. *Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 2547 (2001)	5, 7
Fay v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986)	5
Goodreau v. *Rector & Visitors of Univ. of Va.*, 116 F. Supp. 2d 694 (W.D. Va. 2000)	2
Gundlach v. *Reinstein*, 924 F. Supp. 684 (E.D. Pa. 1996), *aff'd without op.*, 114 F.3d 1172 (3d Cir. 1997)	2, 3, 4
Harris v. *James*, 127 F.3d 993 (11th Cir. 1997)	7
Joseph M. ex rel. Kimberly F. v. *Southeast Delco Sch. Dist.*, 2001 WL 283154 (E.D. Pa. Mar. 19, 2001)	2
Meury v. *Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233 (Ind. Ct. App. 1999)	2
Norris by Norris v. *Board of Educ. of Greenwood Cmty. Sch. Corp.*, 797 F. Supp. 1452 (S.D. Ind. 1992)	2
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981)	6
Sellers by Sellers v. *School Bd. of Manassas, Va.*, 141 F.3d 524 (4th Cir.), *cert. denied*, 525 U.S. 871 (1998)	6

TABLE OF AUTHORITIES—Continued

	Page
CASES:	
Smith v. *Duquesne Univ.*, 612 F. Supp. 72 (W.D. Pa. 1985), *aff'd without op.*, 787 F.2d 583 (3d Cir. 1986)	4
Stowell v. *Ives*, 976 F.2d 65 (1st Cir. 1992)	7
Suter v. *Artist M.*, 503 U.S. 347 (1992)	*passim*
Wilder v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990)	4, 5, 6, 7
STATUTES:	
Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g	*passim*
42 U.S.C. § 671(a)(10) (1992)	4
42 U.S.C. § 671(a)(17) (1992)	4
42 U.S.C. § 672(f) (1992)	4
42 U.S.C. § 1983	*passim*

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REPLY BRIEF FOR PETITIONERS

Respondent's Brief in Opposition does not deny that there is a split among federal and state courts over whether FERPA confers rights that may be enforced in a § 1983 action. Nor does Respondent seriously dispute that the Washington Supreme Court failed to analyze that question using the approach set forth in *Suter* v. *Artist M.*, 503 U.S. 347 (1992), and *Blessing* v. *Freestone*, 520 U.S. 329 (1997). Those cases require that a statute "unambiguously" express Congress' intent to create individual rights enforceable by § 1983 before a court may allow such an action to proceed. Instead, Respondent apparently seeks to obscure those points by reversing the order of the issues presented in the petition and arguing facts of the case not relied on by the Washington Supreme Court. None of Respondent's arguments refutes the

central point of the petition – that the Washington Supreme Court's unprecedented ruling permitting a § 1983 action to enforce FERPA against a private university conflicts with *Suter* and *Blessing* and with the holdings of other federal and state courts.

1. Respondent's only serious attempt to address the clear split in authority identified in the petition, *see* Pet. at 14-16, is to argue that *Gundlach* v. *Reinstein*, 924 F. Supp. 684 (E.D. Pa. 1996), *aff'd without op.*, 114 F.3d 1172 (3d Cir. 1997), is not at odds with the holding below because the plaintiff there did not allege a "policy or practice" of education record disclosure. Opp. at 17. First, even if Respondent were right about this, there is no doubt that the holdings of other courts squarely conflict with the Washington Supreme Court ruling in this case. Those courts directly held that FERPA may not be enforced by § 1983 actions. *See Norris by Norris* v. *Board of Educ. of Greenwood Cmty. Sch. Corp.*, 797 F. Supp. 1452, 1465 (S.D. Ind. 1992) (FERPA is "insufficient to support a § 1983 action for damages"); *Meury* v. *Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233, 239 (Ind. Ct. App. 1999) (plaintiffs "failed to state a private cause of action by invoking § 1983 to remedy an alleged FERPA violation"); *Joseph M. ex rel. Kimberly F.* v. *Southeast Delco Sch. Dist.*, 2001 WL 283154, at *9, *10 (E.D. Pa. Mar. 19, 2001) (denying request for relief under § 1983 to enforce FERPA, citing *Gundlach* and *Suter*).[1] It is thus simply beyond dispute that "there is a split of authority over whether FERPA can form the basis of a claim under section 1983." *Goodreau* v. *Rector & Visitors of Univ. of Va.*, 116 F. Supp. 2d 694, 707 (W.D. Va. 2000).

[1] Respondent is incorrect that *Joseph M.* creates no conflict. *See* Opp. at 17. There, "plaintiffs ask[ed] th[e] Court to allow for recovery under section 1983 *and* impose sanctions." *Joseph M.*, 2001 WL 283154, at *10 (emphasis added). The court's denial of the requested relief, citing cases "denying section 1983 claims under FERPA," *id.*, cannot be reconciled with the holding below in this case.

But further, Respondent is wrong that *Gundlach* is somehow consistent with the Washington Supreme Court's holding here. As an initial matter, contrary to Respondent's contention, the court in *Gundlach* did not hold any violation of FERPA to be privately "actionable." To the contrary, the court refused to permit a § 1983 action to enforce FERPA and held that the cases cited by the plaintiff there (and by Respondent here) permitting such claims were "at odds with what appears to be the prevailing post-*Suter* view in this circuit." *Gundlach*, 924 F. Supp. at 692. That view, the court held, is that "absent satisfaction of the *Cort* v. *Ash* [, 422 U.S. 66, 78 (1975),] test, a plaintiff cannot seek to enforce a federal spending-power based statute by way of a § 1983 action." *Id.* The Third Circuit summarily affirmed the district court judgment. 114 F.3d 1172 (3d Cir. 1997). Notwithstanding Respondent's attempt to downplay the conflict, *Gundlach* is thus squarely at odds with the Washington Supreme Court's holding that plaintiffs may use § 1983 actions to enforce FERPA.

Respondent's argument – that there is no conflict, because plaintiffs in *Gundlach* did not allege a "policy or practice," whereas Respondent asserts that he did, *see* Opp. at 17 – confuses the significance of FERPA's "policy or practice" requirement to the issue before the Court. Whether a policy or practice is alleged may affect the merits of a § 1983 claim to enforce FERPA, but before a court ever reaches the merits it must first decide whether FERPA may be enforced under § 1983 in the first place. That is the issue on which the lower courts have split.

In *Suter* and *Blessing*, this Court acknowledged that the plans of state defendants deviated from requirements of federal statutes, yet held that those requirements did not confer individual rights, privileges or immunities enforceable under § 1983. FERPA – which by its terms simply disqualifies from federal funding education institutions that have a policy or practice of releasing education records without

student consent – also does not create individual rights in students, and certainly does not do so "unambiguously."[2] To demonstrate that a statute may be enforced by a § 1983 action, it is not sufficient to plead a general or systemic *violation* of the statute; rather, plaintiff must show that the statute confers an individual right. And "FERPA was adopted to address *systematic, not individual* violations * * *." *Gundlach*, 924 F. Supp. at 692 (quoting *Smith* v. *Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985), *aff'd without op.*, 787 F.2d 583 (3d Cir. 1986)) (emphasis in *Gundlach*).

2. The crux of the petition is that under *Suter* and *Blessing* a court must ask whether Congress unambiguously intended to confer a specific individual right to enforce the federal law at issue. Here, Respondent cannot use § 1983 to impose liability on a private university for discussing with state teacher-licensing authorities allegations that a would-be teacher had sexually assaulted a fellow student. Rather than confront our points regarding the Washington Supreme Court's failure to apply the analysis required by *Suter* and *Blessing*, Respondent spins the facts and quibbles with various inconsequential details of our reading of those decisions. Respondent's opposition mirrors the confusion among lower courts over the relationship among *Wilder*, *Suter* and *Blessing*. This Court should grant the petition to clarify this relationship.

First, Respondent contends that under the Court's precedents "it is [not] the availability of 'private damages actions' " but "the federal rights underlying the private damages actions" "that must be 'unambiguous.' " Opp. at 21.

[2] Contrary to Respondent's suggestion, mere reference in FERPA to "rights of privacy" and so forth does not mean that Congress intended to confer on students "a right to enforce the [statute's] requirement" using § 1983 damages actions. *Suter*, 503 U.S. at 357. The *Suter* Court found no such enforcement right despite the presence of "rights" language in the statute at issue there. *See* 42 U.S.C. §§ 671(a)(10), (17), 672(f) (1992).

That is wrong. *Suter* clearly asked whether the statute "unambiguously confer[s]" on plaintiffs "a right *to enforce* the requirement" of the statute. 503 U.S. at 357 (emphasis added). Regardless, Respondent's distinction makes no meaningful difference because the Washington Supreme Court failed to look for, or find, unambiguous Congressional intent in FERPA to confer either individual enforcement rights or any "underlying" federal rights. Instead, the court mechanistically applied the open-ended three-part test of *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), without accounting for the more exacting approach this Court's more recent decisions require. *See* Pet. at 11-13.

In particular, the court below never identified precisely what the right was it found enforceable, or where FERPA conferred such a right. Respondent's Opposition does nothing to fill that void. This glaring omission under *Suter* and *Blessing* is a common feature of the decisions which, in conflict with the precedents we have cited, have found FERPA enforceable under § 1983. *See Falvo* v. *Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203, 1211 (10th Cir. 2000) (FERPA "creates an enforceable right within the meaning of § 1983"), *cert. granted*, 121 S. Ct. 2547 (2001); *Fay* v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 35 (2d Cir. 1986) ("FERPA creates an interest that may be vindicated in a section 1983 action"). *Suter* and *Blessing* insist upon a more precise identification of the right allegedly enforceable under § 1983.

Second, while accusing Petitioners of "selective" reading of *Blessing*, it is Respondent who, like the court below, fails to account for the pertinent holdings of that case. Opp. at 22. In *Blessing* the Court emphasized, in refusing to permit a § 1983 action to enforce the statute at issue, that the statute regulated only "*systemwide* performance" rather than "creating an *individual* entitlement." 520 U.S. at 343 (emphasis in original). Further, the Court noted that the statute did not focus on whether "the needs of any particular person have

been satisfied." *Id.* Also significant for the Court in *Blessing* was that the only means of enforcement available to the government under the statute was reduction of federal funding. *Id.* at 344. Although each of these points also applies to FERPA, the Washington Supreme Court, as Respondent seems to concede, never addressed them or the holding in *Suter* because it found lower federal court decisions, including decisions that preceded *Suter* and *Blessing*, "more persuasive" than *Suter* and *Blessing*. Pet. App. 21a.

Respondent addresses only the "enforcement mechanism" point, but it is Respondent who is "flat wrong" in suggesting that FERPA's delegation of enforcement authority to the Secretary of Education creates private judicial enforcement rights. Opp. at 22. Under FERPA, as in *Blessing*, the federal government's authority to compel any action by a private institution such as Gonzaga University rests entirely on the university's acceptance of federal funds. *See Suter*, 503 U.S. at 356 (citing *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). If Gonzaga elected not to comply with FERPA, it could simply withdraw from federal financial assistance. Nowhere in FERPA did Congress suggest that private universities would be subject to additional penalties beyond loss of federal funding. Judicial creation of an additional sanction in the form of a damages action under § 1983 contravenes the Spending Clause agreement between the federal government and the recipient of federal funds. *Cf. Sellers by Sellers* v. *School Bd. of Manassas, Va.*, 141 F.3d 524, 532 (4th Cir.), *cert. denied*, 525 U.S. 871 (1998).

Respondent's argument that *Suter* added no additional requirement to the *Wilder* three-part test, Opp. at 21, and that *Blessing* merely "recapitulated the settled doctrine of *Wright* and *Wilder* without any additional gloss from *Suter*," *id.* at 22, begs a central question Petitioners ask this Court to decide, and underscores the need for this Court's review. Regardless of the dubious merits of Respondent's interpretation, at least three federal courts of appeals disagree. *See*

Evergreen Presbyterian Ministries Inc. v. *Hood*, 235 F.3d 908, 926-927 (5th Cir. 2000) (*Wilder* was "narrowed by the commands of *Suter* and *Blessing* that Congress must unambiguously confer * * * an 'individual entitlement' upon *each* of the plaintiffs") (emphasis in original) (quoting *Blessing*, 520 U.S. at 343-345); *Arkansas Med. Soc'y, Inc.* v. *Reynolds*, 6 F.3d 519, 525 (8th Cir. 1993) (*Suter* added "additional considerations" to the *Wilder* approach); and *Stowell* v. *Ives*, 976 F.2d 65, 68 (1st Cir. 1992) (with decision in *Suter*, "old regime" epitomized by *Wilder* "fell on hard times;" *Suter* "weaken[ed] earlier precedents in certain important respects"); *see also Falvo* v. *Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203, 1211 n.6 (10th Cir. 2000) ("Some courts have concluded that in *Suter* * * * the Supreme Court imposed additional requirements upon [the *Wilder*] analytical framework"), *cert. granted*, 121 S. Ct. 2547 (2001); *Harris* v. *James*, 127 F.3d 993, 1002 (11th Cir. 1997) (noting federal courts of appeals' divergent views on the effect of *Suter* on *Wilder*). Notably, too, Respondent does not argue that the Washington Supreme Court properly applied *Suter*, or properly applied *Blessing* in light of *Suter*, or that application of the *Suter-Blessing* approach would not have changed the judgment below. This case thus squarely presents the Court with an opportunity to resolve a conflict among the Circuits regarding the proper approach in deciding when a federal statute confers § 1983 enforcement rights.

3. Finally, we recommended in the petition that the Court at least hold this case pending decision in *Owasso Independent School District No. I-011* v. *Falvo*, *see* Pet. at 16-17, and Respondent does not dispute that this would be a proper course to follow. Given that the precise question presented here – whether FERPA may be enforced in a § 1983 action – arose in oral argument before this Court in *Falvo*, *see Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, No. 00-1073, Oral Arg. Tr. at 4-10; *id.* at 26-27 (Court questions to Deputy Solicitor General concerning position of the United States on

whether FERPA may be enforced by a § 1983 action), there are now even stronger grounds for at least holding this case pending decision in *Falvo*.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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